this Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted, *together with any receptacle, package, conveyance, vessel* not exceeding two hundred tons nett registered tonnage, or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of customs in any place either on land or in territorial waters."

The operative words are in the middle of that section (italicized by me) which gives powers to seize goods "together with any receptacle, package, conveyance, vessel not exceeding two hundred tons nett". Section 126 goes on to say that "All goods liable to seizure under the provisions of this Act, shall be liable to forfeiture." And section 127 gives powers to the court to forfeit these goods or vessels or vehicles which were seized and here, too, in section 127(1), forfeiture is mandatory once the goods are seized in a proper manner and the goods are the subject matter as provided in section 114(1).

In the Road Traffic Ordinance, 1958 (No. 49 of 1958) section 92(2) which provides for seizure and forfeiture, says: —

"Any motor vehicle in respect of which there has been, or there is reasonable cause to suspect that there has been committed any offence against this section may be seized by any road transport officer or any police officer not below the rank of Inspector in any place."

and sub-section (4) reads: —

"An order for the forfeiture or for the release of any motor vehicle seized under the provisions of sub-section (2) shall be made by the court before which the prosecution with regard thereto has been held, and an order for the forfeiture of such vehicle may be made if it is proved to the satisfaction of the court that an offence against this section has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence."

It will be noted that under the Road Traffic Ordinance the vehicle itself is the subject matter of the offence, or, in other words, "in respect of which an offence has been committed", and hence is liable to seizure and forfeiture, although forfeiture is not mandatory but discretionary.

So, when one compares the three Ordinances there is provision for forfeiture in all of them, but the Road Traffic Ordinance provides for forfeiture of a vehicle which has been a subject matter of the offence. The Customs Ordinance permits the seizure of a vessel used in conveyance of goods which are suspected of an offence against the Customs Ordinance. Now it has long been established that forfeiture imposes a severe and harsh penalty on subjects, albeit sometimes on innocent subjects, and therefore the provisions must be construed strictly. In comparing the different terminology in different laws I must presume that these differences are intentional.

Having given considerable thought to these distinctions in the other Ordinances and having listened to the arguments before me and especially having considered the wording of regulation 3(b) of the Fishing (Maritime) Regulations, 1967, I am forced to the conclusion that while fishing appliances without a licence on board a vessel are the subject matter of an offence under that section, the vessel itself is not, nor can it be said to be used in the commission of the offence under regulation 3(b). On the other hand, if the charge was under section 12(1) of the Act, it may be said that the vessel was used in the commission of the offence, while a charge under section 12(2) may not.

There are several Acts and Ordinances which make it an offence to be in possession of certain articles in certain places while the possession of the same articles in other places does not constitute an offence. It is clear from the interpretation of these Acts that the subject matter of the offence is the article itself and not the place where it is found and, therefore, in considering section 15 which provides for the forfeiture one must read it with section 14 which provides for seizure. Things liable to seizure are liable to forfeiture. But section 14 only applies to the things in respect of which an offence has been committed. An offence under regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, cannot mean that an offence has been committed in respect of the vessel in which they were found; it can only apply to the appliances. If my interpretation is correct, then the vessel is not subject to seizure and forfeiture.

For the reasons I have set out earlier I will dismiss the appeal and release the said vessel.

Appeal dismissed.

Solicitors: *Wilson & Co.*

KHAN KAM CHEE v. LOKE WAN YAT REALTY SDN. BHD.

[O.C.J. (Mohamed Azmi J.) March 28, 1974]
[Kuala Lumpur — Civil Suit No. 782 of 1973]

Practice and Procedure — Pleadings — Counterclaim — Amendment of statement of defence — Addition of co-defendant to propose counterclaim — R.S.C., 1957, O.21, r.11.

The plaintiff sued the defendant by specially indorsed writ for specific performance of an alleged agreement whereby the defendant had given the plaintiff an option to purchase a certain piece of land. Subsequently the defendant applied to amend the defence and to include a counterclaim therein and to add a third party Toby Lam as co-defendant to the counterclaim.

Held: (1) in this case there was no reasonable cause of action against the plaintiff on the counterclaim and the question of adding Toby Lam as a co-defendant to the counterclaim could not possibly arise;

(2) as the amendments to the statement of defence did not entail injustice to the other side, they should be allowed.

Cases referred to:-

(1) *Times Cold Storage Co.* v. *Lowther* [1911] 2 K.B. 100.

(2) *Tham Hoeng Meow* v. *Allied Timber Co. Ltd.* K.L. C.S. No. 189/71 (unreported).

(3) *Derry* v. *Peek* (1889) 14 App. Cas. 337.

Authorities cited other than those referred to in the judgment: *Federal Flour Mills Ltd.* v. *Owners of the Vessel "Ta Tung" & Anor.* [1970] 2 M.L.J. 147; *Factories Insurance Co. (Ltd.)* v. *Anglo-Scottish General Commercial Insurance Co. (Ltd.)* [1913] 29 T.L.R. 312 C.A.; *Quinn* v. *Leathem* [1901] A.C. 495; *Marrinan* v. *Vibart & Anor.* [1963] 1 Q.B. 528; *Torquay Hotel Co. Ltd.* v. *Cousins & Ors.* [1969] 1 A.E.R. 522; *Cartwith Ltd.* v. *J.E. Lloyd & Ors.* [1965] M.L.J. 140.

CIVIL SUIT.

K. Thayalan for the plaintiff.

M. Shankar for the defendant.

H. Jayaram for the third party.

Mohamed Azmi J.: This is an application by the defendant by Summons-in-Chambers dated January 30, 1974 for liberty to amend the defence as per draft Amended Statement of Defence, and also for permission to add one Toby Lam as a co-defendant to the proposed counterclaim or in such other capacity as this court may direct in the interest of justice.

In this case, the defendant is being sued by a specially indorsed writ for specific performance of an alleged agreement made in March 1973, in which the company had given the plaintiff an option to purchase part of its land near Odean Cinema in Kuala Lumpur for the price of $6,160,000 or at the rate of $56 per square foot, and also for injunction and other ancillary reliefs. In its original defence, the defendant company avers that the document, which is the subject-matter in dispute, purportedly signed by Loke Wan Yat (a director of the company) does not constitute a legally enforceable agreement. It is merely an invitation to treat. In the alternative, it is averred that if the said document constitutes an agreement it is void for uncertainty since the exact area of the land to be sold has not even been agreed to or determined. In the further alternative, if the document constitutes a contract, the defendant avers that being a limited company the contract is *ultra vires* and not binding on the defendant on the ground that it is entered into not for the benefit of the company. By paragraph 4 of the Statement of Claim, the plaintiff alleges that a sum of $2,000 was paid as option money by the plaintiff to the defendant company on or about March 27, 1973. The defendant denies this allegation and avers that the payment in question was made by the plaintiff through one Toby Lam (the then secretary of the defendant company) who purported to accept it for the defendant, and it is common ground that on April 9 the defendant by its solicitors returned the $2,000 to the plaintiff. By paragraphs 13 to 16 in the proposed amended defence, the defendant wishes to introduce averments to the effect that in the alternative if the option to purchase the land constitutes a contract, the defendant is entitled to avoid and repudiate it on the ground that the plaintiff knows that the signature of Loke Wan Yat on the option was obtained by Toby Lam in violation of his duty as a secretary to the defendant company; and that both the plaintiff and Toby Lam have conspired to cheat the defendant as to the true value of the land.

It is a well established principle that an application for amendment of pleadings should be allowed unless it will entail injustice to the other side, and normally injustice will result to the other side if: —

(1) the application is made *mala fide;* or

(2) the proposed amendments will prejudice the other party which cannot be compensated by costs; or

(3) the proposed amendments will turn the character of the suit into one of entirely different character.

It is my finding that the new averments in paragraphs 13 to 16 constitute a proper defence in the alternative; and, in my considered opinion, no injustice will result to the plaintiff if that part of the application is allowed. Further, on October 19, 1973 the solicitor for the plaintiff wrote to the defendant's solicitor alleging that the Statement of Defence was vague. Under the circumstances, there is no reason why the plaintiff should now object to the proposed amendments in the Statement of Defence.

The real difficulty in this case is whether the court should allow that part of the amendments for the inclusion of a counterclaim against the plaintiff, and also to add Toby Lam as a co-defendant to the proposed counterclaim. It should be noted at this stage that although in the Summons-in-Chambers the defendant is applying for permission to add Toby Lam nominally as a co-plaintiff to this action but substantially as a co-defendant to the proposed counterclaim, in the course of his submission Mr. Shanker for the defendant quite correctly concedes that Toby Lam cannot be made a co-plaintiff and as well as a co-defendant to the counterclaim in this suit, but he maintains that Toby Lam can be added as a co-defendant to the proposed counterclaim in order to save costs and avoid duplicity of proceedings. But Mr. Thayalan for the plaintiff and Mr. Jayaram for Toby Lam object to the application on the ground that the proposed counterclaim as it stands does not disclose any reasonable cause of action, and on the application to add Toby Lam as a co-defendant to the proposed counterclaim it is argued that on the authority of *Times Cold Storage Co.* v. *Lowther*[1] it should not be allowed. Mr. Jayaram further argues that the court should invoke Order 21 rule 15 of the Rules of the Supreme Court, and that the proposed counterclaim should be brought as a separate action or, alternatively, Toby Lam should be brought in as a third party.

In *Times Cold Storage Co.* v. *Lowther, ante,* T (the original plaintiff) brought an action against L for recovery of storage charges. The claim was admitted subject to a counterclaim against T and N for damages for negligence and breach of duty and of contract *jointly* or, in the alternative, *separately* against each of the defendants to the counterclaim. An order was made by the Registrar of the City of London Court adding N as defendant to the counterclaim, and ordering L to deliver further particulars on the counterclaim. After further particulars were given, N applied to a judge for an order that its name be struck out as defendant to the counterclaim or that the counterclaim against it be dismissed. The judge dismissed the application, and on appeal it was argued on behalf of N that the particulars of the counterclaim showed no joint cause of action against the two defendants — T and N. There was no joint contract suggested nor any joint breach of contract, and the causes of action raised by the counterclaim were alternatives and inconsistent. In allowing the appeal, it was held that a person cannot be joined as a defendant to a counterclaim under Order X rule 22 of the County Rules 1903 (which is in *pari materia* with our Order 21 rule 11 of the Rules of the Supreme Court) against whom an alternative cause of action only is alleged. In the course of his judgment, Bankes J. said at page 108:

"... upon the authorities, it has been decided that a defendant cannot under the words of Order X., r. 22, join a person as defendant to a counter-claim against whom he alleges that he has got an alternative cause of action, i.e., a cause of action in the event of his failing to succeed against the original plaintiff."

It should, however, be noted that in *Times Cold Storage* case the decision was based on the footing that the defendant in the original action had asserted his right to join as defendant to a counterclaim a party against whom relief is claimed in the alternative only and not jointly with the original plaintiffs. It should also be noted that in that case it would appear that there was already a counterclaim in the original defence, and that the claim was admitted subject to the counterclaim. What the defendant wanted to do in that case was to add a third party as a co-defendant to the counterclaim. Whereas in our case, the defendant is applying not only to include the counterclaim for the first time but also to add its former secretary, Toby Lam, as a co-defendant to the proposed counterclaim. Under the circumstances, apart from anything else, it is essential in the first place to determine whether there is any cause of action raised by the counterclaim against the plaintiff before the court considers whether the cause of action against the plaintiff and Toby Lam is joint or in the alternative. If the relief claimed against Toby Lam is in the alternative only and not jointly with the plaintiff, the application to join Toby Lam as a co-defendant to the counterclaim should not be allowed. In my view, this is what is meant by the 1957 *White Book* when it says at page 379 that Order 21 Rule 11 does not apply where the defendant's claim against the third person is alternative only to his claim against the plaintiff and not "along with" it. In other words, the rule does not apply where the cause of action or the relief claimed in the counterclaim would only entitle the defendant to succeed either against the plaintiff or the third person but not against both. Now, in the proposed counterclaim, it is averred in paragraph 14 that the said Toby Lam and the plaintiff were both parties to a conspiracy to procure the option to purchase in the manner calculated to deprive the defendant of the true value of the land and unjustly to enrich both the plaintiff and the said Toby Lam. This is then followed by four particulars of the said conspiracy. Further, in paragraph 19, the defendant avers that the aforesaid Toby Lam was to the knowledge of the plaintiff derelict in his duties to the defendant as the fact that the plaintiff was not a genuine purchaser but merely speculating on the defendant's land with a view to its resale at a profit was also concealed from the said Loke Wan Yat, and under paragraph 20 the defendant prays against the plaintiff and Toby Lam for a declaration that if the said option is a contract the same has been vitiated and/or that the defendant is entitled to repudiate and avoid the same and also for damages and other ancillary reliefs. Having considered the averments in the proposed counterclaim and the prayers sought, it is my finding that the proposed counterclaim as it stands does not clearly set out what the cause of action is against the plaintiff. A counterclaim is virtually a cross-action and is subject to the same rules of pleading as a Statement of Claim. To digress a little, in the case of *Tham Hoeng Meow* v. *Allied Timber Co. Ltd.*[2] which was referred to by Mr. Thayalan, I had the occasion to express my doubt as to the desirability of allowing a counterclaim to be included for the first time after the close of pleadings, as I was of the view that a distinction should be made between amendment of a counterclaim which had already been set up in the original defence and an application to include a counterclaim for the first time. Going back to the present case, in the course of his submission, Mr. Shanker first suggested that the defendant's cause of action was in deceit and the unjust deprivation of the defendant by that deceit as envisaged in the case of *Derry* v. *Peek*.[3] He then suggested that the cause of action was based on section 168 of the Contracts (Malay States) Ordinance, 1950. If deceit is the cause of action, then it must be specially pleaded. (See Order 19 rule 6). Since fraud is an essential element in an action for deceit, without fraud statements made even with gross negligence give rise to no cause of action. Further, the defendant should plead that this deceit, fraud or misrepresentation must not merely be capable of causing damage but it must have actually caused it. In other words, special damage should be pleaded. As regards section 168 of the Contracts Ordinance which deals with the right of a principal to repudiate a transaction, when an agent deals on his own account, in business of agency without the principal's consent, it can only be a defence to the plaintiff's claim and cannot constitute a cause of action against the plaintiff. Since there is no reasonable cause of action against the plaintiff, the question of adding Toby Lam as a co-defendant to the counterclaim cannot possibly arise.

For the above reasons and based on the draft amended pleading as it stands, I order that the defendant be at liberty to amend his Statement of Defence as proposed but dismiss his application to include the counterclaim against the plaintiff and Toby Lam, and I also order that the costs of this application and of the consequential amendments should be borne by the defendant in any event. The defendant is, of course, at liberty to take out third party proceedings or separate action against Toby Lam.

As regards the plaintiff's application for Interrogatories vide Summons-in-Chambers dated November 22, 1973, I order that the application be allowed and that the costs of the application be paid by the defendant to the plaintiff in any event as agreed.

Order accordingly.

Solicitors: *Skrine & Co.; Shearn, Delamore & Co.; Ram, Rais & Yap.*